IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1298

SAMUEL CAVALIERI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of certiorari to review an order, as amended, of the Court of Appeals of the State of New York entered November 17, 1971 [29 N.Y. 2d 762], unanimously affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered April 15, 1971, modifying on the law (i.e., from a multiple count conviction to a single contempt conviction) and otherwise affirming a judgment of the Supreme Court of Bronx County rendered June 26, 1970, convicting the petitioner, after a non-jury trial, of twenty-

five counts of the misdemeanor of Criminal Contempt [N.Y. Penal Law, §215.50], and sentencing the petitioner to serve a term of one year in the New York City Correctional Institution for Men. He is presently at liberty on bail pending determination of this application.

The Questions Presented

In our view there are no substantial federal questions in this case.

Statement of the Case

A raid upon a Bronx gambling establishment on November 11, 1968, prompted a grand jury investigation, during which the petitioner Samuel Cavalieri was called as a witness. After being sworn on March 7, 1969, Cavalieri gave his name and address to the first query, but when asked the next question (*i.e.*, about what his business or occupation was), he replied, "I refuse to answer on the grounds that it may tend to incriminate me" (114).* Whereupon, the petitioner was asked by the prosecutor to leave the grand jury room (*ibid.*).

After his return to that room, Cavalieri was advised by the prosecutor about the nature of the grand jury's probe, namely, to determine "* * * whether there has been a conspiracy to violate the gambling laws, loan-sharking, taking of money illegally, and putting them into legitimate business in Bronx County" (115). Immediately following that advisement, Cavalieri commenced to voice a claim of

* References are to the printed record on appeal to the New York State Court of Appeals.

privilege under the Fifth Amendment, but he was quickly reminded that he had not as yet been asked a question (*ibid.*).

Next, the prosecutor informed the petitioner that the grand jury had voted to immunize him, after which the assistant district attorney went on to explain, in essence, that Cavalieri, who was not "a target" of the investigation, would receive immunity, except for prospective perjurious or contumacious conduct before the investigatory group:

> "I tell you now, the Foreman of the Grand Jury has told me to tell you that the Grand Jury has voted to give you immunity. Now when the Grand Jury votes to give you immunity, it means if you are directed to answer questions by the Foreman of the Grand Jury, and since you have been granted immunity, anything you say under oath, and you have been sworn as a witness before the Grand Jury, cannot be used in evidence against you. It also means if you say anything that we can get a lead from, that may hurt you in some criminal way, that cannot be used in evidence against you.
>
> "So that in effect you cannot be prosecuted because of anything you say. There are two things the Grand Jury cannot give you immunity for. Perjury, and Criminal Contempt. By that I mean, when you answer questions, you must answer them truthfully. If the Grand Jury should feel you answered untruthfully, and did it in a wilful manner, they could vote the crime of Perjury against you. Anything they cannot grant you—another thing they cannot grant you immunity for is Contempt.
>
> "By that I mean, you must answer the questions, because there is no reason you cannot answer the ques-

tions at this time, since you cannot be prosecuted for it. That means what you are getting before this Grand Jury, you are getting a pat. You are being walked away from any possible prosecution, for anything that you say before this Grand Jury cannot be used against you. I am telling you this so you are fully aware and realize what the circumstances are.

"You are not a target of this investigation. We are not looking specifically at you. We think you have some knowledge or information that will enable this group of people, this Bronx Grand Jury, to determine whether or not there has been violation of laws by other persons.

"Now I'm going to ask you questions. I would hope that you would cooperate to the fullest with this Grand Jury, and do your duty, and testify before this Grand Jury, in order that we may be able to have this Grand Jury intelligently, on the matters pending before this Grand Jury" (115-117).

Thereafter, a single pattern emerged (117-28). That is to say, the assistant district attorney asked a question, after which Cavalieri would voice a refusal to answer on the grounds of possible self-incrimination (*ibid.*). Then, the foreman of the grand jury would direct Cavalieri to respond to the prosecutor's question, after which the petitioner would again assert his privilege against testimonial compulsion (*ibid.*).

The just-described recalcitrance on the part of Cavalieri ultimately led to his indictment for twenty-seven counts of Criminal Contempt.

When told inside the grand jury room that immunity was being conferred upon him, Cavalieri did not understand

the relevant concept (*id.* 203). The petitioner refused to answer questions posed by the prosecutor, and Cavalieri wanted the aid of counsel, albeit he did not request such assistance and none was offered him (*id.* 205-6). Moreover, the petitioner failed to understand the questions that were put to him (*id.* 206).

On cross-examination, Cavalieri acknowledged that he had been subpoenaed several times to appear before the relevant deliberative body prior to March 7, 1969, on which occasions he was not actually called as a witness (*id.* 209-12). However, during the period between receiving the first subpoena and March 7th, petitioner did not obtain an attorney, for he did not think he needed such help prior to the date just mentioned (*id.* 212-14). On that day, however, he was unable to understand all of the prosecutor's questions, with the result that Cavalieri then decided he needed a lawyer (*id.* 214-16). Prior to that time, the petitioner Cavalieri did not know that he had the right to be represented by an attorney (*id.* 238).

As a consequence of his conduct before the aforesaid body of inquest, Samuel Cavalieri was later charged, in a twenty-seven count indictment with the crime of Criminal Contempt. After a non-jury trial before a judge, who voiced his decision from the bench, petitioner was convicted of twenty-five of the counts, but a single sentence was meted out.

During the trial, Cavalieri took the stand on his own behalf. According to the petitioner, on the day he appeared before the relevant investigatory body, he had a conversa-

tion outside the grand jury room with an assistant district attorney. At that time, Cavalieri allegedly asserted that he had no counsel present, to which plaint the prosecutor reportedly answered: " 'It makes no difference. You going in today' " (203). The petitioner went on to plead for an opportunity to get a lawyer, but the prosecutor denied that request (*ibid.*).

ARGUMENT

POINT ONE

Petitioner was offered immunity co-extensive with the right of silence guaranteed under the Fifth and Fourteenth Amendments to the Federal Constitution and wilfully refused to answer the questions.

Petitioner asserts that he did not receive a full and fair notice of the grant of transactional immunity at the time of his grand jury appearance and hence cannot be deemed to have "wilfully" refused to answer the queries when he invoked his Fifth Amendment privilege against self-incrimination employing the classical formulation for "taking the Fifth". He does not claim that the relevant statute [Section 619-c of the Code of Criminal Procedure, superseded 9/1/71 by Criminal Procedure Law] fails to supplant the Fifth Amendment right of silence with an "immunity" that is as co-extensive as the fundamental right [see, *Counselman* v. *Hitchcock*, 142 U.S. 547, 35 L. Ed. 1110, 12 S. Ct. 195 (1892)].

At the outset, we note that owing to the fact that the aforesaid statutory prescription has been construed to be

not self-executing [*People* v. *DeFeo*, 308 N.Y. 595 (1955)], the issue of the adequacy of the notice, as posed herein, has come within the purview of New York State's highest tribunal on several occasions in unrelated cases [see, *i.e.*, *People* v. *Mulligan*, 29 N.Y. 2d 20 (1971); *People* v. *Tramunti*, 29 N.Y. 2d 28 (1971); *People* v. *Masiello*, 28 N.Y. 2d 287 (1971)]. In each situation the inquiry has been the same, to wit, did the accused receive "full and fair notice" of the grant of transactional immunity. Hence, Cavalieri's plaint is in a true sense uniquely confined to the particular facts of his case, a situation, we suggest, of little moment to future cases [see the new Criminal Procedure Law of the State of New York, Article 50 and §190.40, which hopefully will tend to eliminate the problem discussed herein].

Beyond these preliminary remarks, it should be observed that in New York a person can not be legally convicted of the crime of contempt if the immunity advisement does not adequately apprise him of the grant of transactional immunity even though he had not been misled by the pertinent recital [*People* v. *Mulligan, supra; People* v. *Tramunti, supra; People* v. *Masiello, supra*]. This *per se* rule apparently provides a defendant tried in New York with a greater safeguard than in other jurisdictions and, perhaps, affords him a broader protection in a criminal proceeding than is mandated under the Federal Constitution. In any event, once the advisement has been adjudged to have conferred the proper immunity, the question of misleading becomes a matter of defense at trial.

Aside from the fact that the Court of Appeals found the pertinent recital of the immunity grant to petitioner to conform with language approbated in an earlier decision

of that tribunal [see, *People* v. *Mulligan, supra*], it is implicit in the affirmance of the judgment of conviction that Cavalieri had not been misled by the advisement, a plaint that was raised as a defense at trial [see, *People* v. *Masiello, supra*]. Thus, petitioner, as the trial court properly concluded, "* * * chose a course of conduct which was deliberate, planned and contumacious beyond a reasonable doubt" [see, Appendix A]. In short, Cavalieri has failed to even raise a substantial constitutional question worthy of this Court's consideration [*Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1963); *United States* v. *Johnston,* 268 U.S. 220, 227 (1925)].

POINT TWO

Petitioner was not denied the right to counsel when he appeared before the grand jury.

The claim voiced herein, *i.e.*, that petitioner was denied the assistance of counsel, was rejected by the trial court and the intermediate appellate court. The trial court found the plaint unbelievable inasmuch as petitioner had been subpoenaed several times to appear before the grand jury and at no time during his actual appearance did he express a need for the assistance of counsel while he steadfastly refused to answer any questions using the classical formulation for invoking his Fifth Amendment privilege [see, Appendix A]. As the trial judge's finding was affirmed by the intermediate appellate court [36 A.D. 2d 284 (1st Dept. 1971)], New York State's Court of Appeals had no power to review the issue [see, *People* v. *Robles,* 27 N.Y. 2d 155, 157 (1970); *People* v. *Yukl,* 25 N.Y. 2d 585, 588 (1969); *People* v. *Leonti,* 18 N.Y. 2d 384, 389 (1966), *cert. den.* 389

U.S. 1007 (1967); *People* v. *Eisenberg,* 22 N.Y. 2d 99 (1968)]. Ultimately, then, the issue as raised herein, to wit, did the petitioner request the aid of counsel, turns solely upon an analysis of the particular facts of the case and is not the type of subject matter usually reviewed by this Court [*United States* v. *Johnston, supra*].

Nothing in the foregoing exposition should be construed to mean that Cavalieri under the proper circumstances was not entitled to the aid of counsel. The decision in *People* v. *Ianniello* [21 N.Y. 2d 418 (1968), cert. den., 393 U.S. 827 (1968)] is informative on the subject of the extent to which the right to counsel attaches in grand jury proceedings. The cited case establishes the witness' right to be excused from the grand jury room to consult with his lawyer about "a proper matter", such as the relevancy of a particular question to the subject matter of the investigation. Incidentally, much of the petitioner's argumentation at this time simply points up the ways that an attorney might be helpful to a witness circumstanced in the relevant context, considerations recognized by the Court of Appeals in *Ianniello* but hardly helpful in resolving the instant case. Be that as it may, *Ianniello* also requires the existence of a *bona fide* issue as to the pertinency of a question as to a prerequisite for excusing the witness from the grand jury room in order to consult with his attorney. Finally on this score, the opinion under discussion declares that the denial of a request to consult with his counsel does not give a witness a license to commit perjury or contempt; rather the witness must persist in his refusal to answer, thereby forcing the prosecutor to seek a judicial ruling in open court.

Turning back to the instant case, no claim was ever made by Cavalieri that his resort to the constitutional protection against self-incrimination had been voiced to challenge the "scope" of the immunity being conferred upon him. Moreover, the petitioner does not now take umbrage with the finding below that the grand jury probe was a legitimate investigation. By proving that Cavalieri was apprised about the "scope" of immunity, a subject discussed *supra*, and about the purpose of the grand jury's investigation, the prosecution made out a *prima facie* case, as we have seen, and the petitioner's plaints about being uneducated and thus unable to understand what was happening before the investigatory body constituted matters of defense at trial.

The trial judge rejected the proffered defense, and that jurist had, we submit, a legally sufficient basis for so doing as the appellate court below held [see *People* v. *Saperstein*, 2 N.Y. 2d 210 (1957)]. Of course, the trial court and the intermediate court rejected the defendant's claim about a prosecutor denying his request for counsel on the day of Cavalieri's appearance before the grand jury. That action was justifiable on two grounds.

Firstly, the prosecutor's action did not, *per se*, deprive the petitioner of the assistance of counsel, due to the fact that Cavalieri had been called several times before testifying, and thus had ample opportunity to obtain the help of a lawyer. Under such circumstances, it may not be said that Cavalieri was unfairly forced to make decisions in the enforced absence of counsel, a type of wrong which the courts rightfully will not sanction [see *People* v. *Ianniello*, *supra*;

Matter of Conlon v. *Murphy*, 24 A.D. 2d 737 (1st Dept. 1965)].

Secondly, the trial judge may have disbelieved the petitioner's relevant assertions as part and parcel of that jurist's rejection of Cavalieri's general credibility. For the record as a whole belies the petitioner's claim about his inability to understand the grand jury proceedings. Illustrative is the fact that Cavalieri manifestly had no difficulty in articulating his constitutional privilege, and the fact that he failed to signify, by asking for the help of counsel or otherwise, that he was unable to understand what was happening before the grand jury. Also, Cavalieri did not explicitly claim at trial that his taciturnity stemmed from a desire for an attorney's help. Insofar as *Ianniello* is concerned in this respect, the comments therein about seeking a judicial ruling presuppose that the refusal to answer is intertwined with an unheeded but proper request to the grand jury for an opportunity to consult with counsel—a context critically different from the instant setting. Viewing the trial court's relevant ruling as a resolution of credibility, then, no basis for disturbing his determination has been demonstrated.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

The Decision at the Trial Court Level

The defendant has been charged with twenty-seven criminal contempts in an indictment tried before this Court without a jury which, in substance, alleged that defendant refused to answer questions put to him before a grand jury after having been granted immunity.

The People's case consisted of testimony which established the authority of the November, 1968 "B" Grand Jury which was held over to and including March of 1969, as well as the testimony of the acting foreman with regard to the nature and relevance of the investigation and the grant of immunity which was given to the defendant, a witness duly subpoenaed to appear before that body.

It appears that the Grand Jury was investigating gambling and usury violations and was initiated from a raid which took place on November 11, 1968, at a location in the northeast Bronx where several arrests were made and contraband seized.

The Grand Jury transcript which was placed into evidence without objection disclosed that defendant was called as a witness, responded with his name and address and then refused to answer any further questions. He was excused and upon being recalled, was told that the Grand Jury had conferred immunity upon him, was requestioned and refused to answer the next twenty-seven questions put to him, which are the individual counts of the indictment.

The defendant took the stand in his behalf upon this trial and testified that he did not have benefit of counsel, had no knowledge of the legal consequences of immunity and was told by an assistant district attorney that he did

not need counsel. *The Grant of Immunity*: The power of a grand jury to confer immunity in a gambling conspiracy investigation is statutory, (Section 619-e, Code of Criminal Procedure, subdivision "i").

Clearly, the statutory purpose of granting immunity to one person so as to gain evidence against others mandates that the grand jury be allowed to do so (Matter of Gold v. Menna, 25 N.Y. 2d 475). In that case the alleged crimes being investigated were conspiracy to commit murder, not enumerated in the Code of Criminal Procedure specifically. The Court of Appeals, however, recognized the usefulness of the immunity grant by the Grand Jury as a weapon to seek out the truth. To hold otherwise would pervert the very purpose of a grand jury's existence.

Relevance and Materiality: Defendant has raised the issue of the relevance and materiality of the questions posed to defendant and cites People v. Miranda, a decision of the Queens Supreme Court dated March 24, 1970. The distinguishable features between that case and the case at bar is that in the former there was a general investigation and "indiscriminate summoning of witnesses with no definite object in view". In the instant case, testimony was produced at the trial which established the specific aims of the Grand Jury and how these aims related to the defendant as a witness before the Grand Jury. The relevance of the questions need not be conclusively established but it is enough if the bearing of the questions on the subject of the investigation was susceptible of intelligent estimate (Matter of Koota v. Colombo, 17 N.Y. 2d 147). The legality and propriety of a question is a question of fact which the triers of the facts,—in this case the Court,—must determine (People v. McAdoo, 45 Misc. 2d 664).

Applying the standards as set forth above, the Court makes the following rulings with regard to each count of the indictment: 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, guilty beyond a reasonable doubt. As to counts 7th and 16th, not guilty.

Right to Counsel: The Court would like to note that the defendant, upon direct examination, testified that he did not have the benefit of counsel when called as a witness before the grand jury. The testimony herein showed that defendant made more than one appearance before that body and twenty-seven separate occasions used the following words: "I refuse to answer on the grounds that may tend to incriminate me." These exact words coming from the mouth of a person who now claims ignorance and near illiteracy clearly belies that argument and the Court rejects it completely as specious. At no time did the defendant ask permission to go out of the grand jury room to consult with any counsel nor in any other manner indicate that he did not know exactly what he was doing. This is not a case where defendant is being victimized because of denial of the right of counsel by law enforcement officials.

It is unquestionable that defendant chose a course of conduct which was deliberate, planned and contumacious beyond a reasonable doubt (247-51).